No. 80-773

# In the Supreme Court of the United States

OCTOBER TERM, 1980

JULIAN A. PENELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
JOHN F. MURRAY
*Acting Assistant Attorney General*
CHARLES E. BROOKHART
FARLEY P. KATZ
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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**QUESTION PRESENTED**

Whether petitioner's retrial is barred by the district court's declaration of a mistrial on the ground that the jury was deadlocked.

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## OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A1-A2) is not reported. The memorandum order of the district court (Pet. App. A3-A12) is not reported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. A13-A14) was entered on September 17, 1980. The petition for a writ of certiorari was filed on November 14, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Virginia for attempted tax evasion and subscribing to false tax returns, in violation of 26 U.S.C. 7201 and 7206(1). His jury trial commenced on June 11, 1979, and the jury began its deliberations shortly before 3:00 p.m. on June 13, 1979 (Pet. App. A5). Having been advised by the marshal that the jury was unable to reach a verdict, the district court directed the jury to return to the courtroom at 5:47 p.m. The following colloquy ensued (A. 20-21):[1]

> THE COURT: Ladies and gentlemen of the jury, I understand from the Marshal that you have not been able to arrive at a verdict.
>
> I certainly don't want you to make any response as to how the jury stands or what the problems are, anything of that sort, but do you feel that if we were to recess you for this evening and let you think about it tonight and return in the morning that would be of any benefit to you?

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[1] "A." refers to the joint appendix filed in the court of appeals.

I want you to thoroughly understand that the Court has no desire and would not attempt in any way to try to pressure you towards reaching a verdict or to pressure any juror to change any opinion that such a juror has.

If you can think over it on your own, when you are alone, sometimes you can recall some events that happened during the trial or something that was said or some discussions that went on, and that may assist you in arriving at a verdict.

Do you feel that would be of assistance to you or do you have the feeling you have deliberated—and you have very patiently for several hours—

Do you feel that it would be of any assistance to recess and return in the morning or to even stay later tonight?

We're willing—I'm willing—to remain as long as the jury wishes to remain.

I'll do it any way you like.

What are your feelings about it?

A JUROR: May we have a moment, your Honor?

THE COURT: Yes, sir.

THE JUROR: I think we'd like to try it again tomorrow, your Honor.

THE COURT: All right.

At approximately 9:00 a.m. the following morning, the jury resumed its deliberations (A. 27). At 10:26 a.m., the district court informed counsel that the jury had again reported that it could not reach a verdict. Although the bench conference at which this information was imparted

was not reported, the district court opinion states (Pet. App. A7) that "[c]ounsel agreed a mistrial was in order and the jury should be discharged." (See also *id.* at A8.) The jury then returned to the courtroom and the following exchange took place (A. 28-29):

> THE COURT: Ladies and gentlemen of the jury, I understand from the Marshal you have not been able to arrive at a verdict.
>
> Am I correct about that?
>
> A JUROR: Correct.
>
> THE COURT: I want you to thoroughly understand that the Court has no intention or desire to impose upon you in any way, but merely to say to you that we're here to be of any assistance that we can.
>
> Do you feel that any further deliberation would be of any value to you?
>
> Mr. Foreman, do you have a feeling that that would be of any assistance, further time to deliberate?
>
> THE FOREMAN: No, sir.

The court then dismissed the jury and declared a mistrial. Petitioner made no objection to the declaration of the mistrial (Pet. App. A7).

The mistrial was declared on June 14, 1979, and retrial was scheduled to commence on October 9, 1979. On September 11, 1979, nearly three months after declaration of the mistrial, petitioner filed a motion to dismiss the indictment on double jeopardy grounds (Pet. 11). The district court denied the motion on September 25, 1979 (Pet. App.

A3-A12), and petitioner filed this interlocutory appeal pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals affirmed (Pet. App. A1-A2).[2]

## ARGUMENT

1. It is well settled that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request." *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980), slip op. 13; *United States* v. *Scott*, 437 U.S. 82, 93-94 (1978); *United States* v. *Dinitz*, 424 U.S. 600, 606-608 (1976); *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion). There can be little doubt that the same result obtains where the possibility of the declaration of a mistrial is initially raised by someone other than the defendant, and the defendant, through his counsel, consents thereto. Here, as the district court noted (Pet. App. A7), "[c]ounsel agreed a mistrial was in order and the jury should be discharged." Accordingly, the Double Jeopardy Clause does not bar petitioner's retrial.[3]

2. In any event, the record reveals that the district court acted well within its discretion in declaring a mistrial and discharging the jury, regardless of whether petitioner had

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[2]This case illustrates the substantial price that is often paid by the criminal justice system as a result of *Abney's* holding permitting pretrial appeals of double jeopardy claims. We view petitioner's claim, while perhaps not frivolous, as insubstantial. Nevertheless, his appeal has now delayed his retrial by more than 15 months.

[3]Indeed, we would submit that it is incumbent upon the defendant to object to the declaration of a mistrial, since it is his "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)) that is at stake, and he is uniquely situated to know whether he wishes to assent or forego that right. The issue of the double jeopardy consequences of a defendant's silence in the face of a proposed mistrial is not before the Court in this case, however, since petitioner not only failed to object to the declaration of the mistrial, but affirmatively consented to it (Pet. App. A7-A8).

consented thereto. "This Court has long recognized that the Government may bring a second prosecution where a mistrial has been occasioned by 'manifest necessity.' " *United States* v. *DiFrancesco, supra*, slip op. 13. Indeed, the classic example of "manifest necessity" justifying discharge of the jury and retrial of the defendant is "the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978); *Downum* v. *United States*, 372 U.S. 734, 736 (1963); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

Petitioner contends, however, that there was no manifest necessity for a mistrial here because the district court merely assumed, without determining on the record, that the jury was deadlocked, and because it erred in failing to consider alternatives to the declaration of a mistrial. Both courts below rejected these claims, and there is no warrant for further review of this largely fact-bound issue. In any event, the record amply supports the district court's conclusion that the jury was deadlocked.

This Court has made clear that great deference is due a trial court's determination that a jury is deadlocked and its discharge of it on that ground (*Arizona* v. *Washington, supra*, 434 U.S. at 509-510 (footnotes omitted)):

> [I]n this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the

> jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

Moreover, petitioner's contention (Pet. 24-38) that the district court only assumed that the jury was deadlocked is flatly refuted by the record. On June 14, 1979, the jury informed the court (for the second time in two days) that it was unable to reach a verdict. The court then recalled the jury and asked it as a group whether it was unable to reach a verdict, to which one of the jurors responded in the affirmative. The court then asked the jury collectively and the foreman individually whether any further deliberation would help. When the foreman answered in the negative, the court, which had previously secured the parties' consent to this course of action, discharged the jury. It was entirely proper for the court to question the jury in this manner and, on the basis of its responses, to conclude that it was deadlocked and to discharge it. See *Arnold* v. *McCarthy*, 566 F. 2d 1377, 1386-1388 (9th Cir. 1978); *United States* v. *Beckerman*, 516 F. 2d 905, 908-910 (2d Cir. 1975); *United States* v. *See*, 505 F. 2d 845, 851-854 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).[4]

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[4]While it is apparent from the record that the district judge's inquiries were directed to the entire panel (see page 3, *supra*), even if he had addressed only the foreman, the cases on which petitioner relies (Pet. 29-38) do not support his contention that his retrial would be barred by the use of that procedure. The motion for dismissal of the indictment on double jeopardy grounds that was at issue in *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F. 2d 1034 (3d Cir. 1975), was

Nor was the district court required to resort to any further alternatives before declaring a mistrial and discharging the jury. While the existence of possible alternatives might be relevant in other contexts (see, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 487 (1971) (plurality opinion)), the most critical factor in determining that a jury is deadlocked is its own statement that it is unable to reach a verdict. *Arnold* v. *McCarthy*, *supra*, 566 F. 2d at 1387.

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made after the defendant had undergone two jury trials, during each of which the trial court *sua sponte* had raised the issue of jury deadlock. *Id.* at 1035-1036. Moreover, at the second trial, the defendant's counsel "promptly objected to the declaration of a mistrial" (*id.* at 1036). Thus, it was in the context of the foregoing circumstances that the Third Circuit made the "addition[al]" observation (*id.* at 1043) regarding the trial court's questioning of only the foreman quoted at pages 30-31 of the petition. Indeed, the court of appeals expressly noted (516 F. 2d at 1044 n.56) that "[i]f the jury had, on its own initiative, declared itself deadlocked, there might have been less necessity for the judge to have inquired into the opinions of the other jurors since, in such situation, the jury would presumably have reached a consensus before reporting its deadlock to the judge. *Cf. United States* v. *See*, 505 F. 2d 845, 851 (9th Cir. 1974)."

Similarly, in *United States* v. *Horn*, 583 F. 2d 1124 (10th Cir. 1978), the jury had sent a note signed by its foreman to the trial court, stating that " '[t]he jury appears to be deadlocked.' " *Id.* at 1125. At that point, the court declared an overnight recess and instructed the jurors to return and resume deliberations in the morning. When the jury appeared the following morning, the trial court charged them pursuant to *Allen* v. *United States*, 164 U.S. 492, 501 (1896), and instructed them to resume their deliberations. Approximately one hour later, however, the trial court recalled the jury and, *sua sponte*, declared a mistrial and discharged the jury, without making any inquiry "of the foreman or of individual jurors whether it was a consensus of the jury that they had made progress. Nor did the judge inquire whether the members expected to reach a verdict." 583 F. 2d at 1125. Under those circumstances, the Tenth Circuit held, retrial of the defendant was barred. Contrary to petitioner's suggestion (Pet. 35-38) that *Horn* is authority for the proposition that questioning the foreman alone is insufficient, however, the court of appeals in *Horn* clearly indicated (583 F. 2d at 1128) that it would have found no double jeopardy bar to retrial if the trial court had followed the procedure employed by the district court in

Here, the jury on two occasions stated unequivocally that it was deadlocked. Moreover, there would have been no point in suggesting further deliberation, as petitioner proposes (Pet. 40-46), as that had already been attempted without success.[5] Nor is there any requirement that a court give an *Allen* charge (see Pet. 46-50); it is entitled to take the jury's statement that it is deadlocked at face value. *United States* v. *Beckerman, supra,* 516 F. 2d at 908; *United States* v. *See, supra,* 505 F. 2d at 854. See generally *Arizona* v. *Washington,* 434 U.S. at 509; *Arnold* v. *McCarthy, supra,* 566 F. 2d at 1387. Finally, the district court was not required to reinstruct the jury, as petitioner suggests (Pet. 51-56). See *United States* v. *Beckerman, supra,* 516 F. 2d at 908. In any event, there is no indication that doing so would have increased the likelihood of obtaining a verdict.

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*United States* v. *Beckerman, supra.* In that case, only the foreman had indicated to the trial court that the jury was deadlocked. 516 F. 2d at 908.

Nor, contrary to petitioner's assertion (Pet. 34), did *Arnold* v. *McCarthy, supra,* hold that questioning the foreman alone is insufficient. See 566 F. 2d at 1387. While the jury in that case, in fact, had been questioned as a group, in finding no double jeopardy bar to retrial the Ninth Circuit relied (*ibid.*) on its prior decision in *United States* v. *See, supra,* in which it had approved of questioning the jury individually, *through its foreman,* or as a group concerning the possibility that further deliberations could overcome a perceived deadlock. 505 F. 2d at 851. Finally, in *United States* v. *Lansdown,* 460 F. 2d 164 (4th Cir. 1972), the Fourth Circuit not unexpectedly found that there was no manifest necessity for the district court's declaration of a mistrial in the face of the foreman's statement to the court that the jury was "on the verge" of a verdict (*id.* at 167), and, accordingly, held that retrial was barred by the Double Jeopardy Clause.

[5]Although the length of deliberation is a factor to be considered (see Pet. 41-43), there is no minimum period of time the jury must deliberate. *Arnold* v. *McCarthy, supra,* 566 F. 2d at 1387; *United States* v. *See, supra,* 505 F. 2d at 852. The length of deliberation here (nearly 4 1/2 hours over 2 days) was adequate given the length of the trial (2 1/2 days) and the jury's repeated statements of deadlock.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JOHN F. MURRAY
*Acting Assistant Attorney General*

CHARLES E. BROOKHART
FARLEY P. KATZ
*Attorneys*

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